STATE OF MICHIGAN

IN THE SUPREME COURT

APPEAL FROM THE COURT OF APPEALS
(Markey, Cavanagh, R.P. Griffin)

DAVID SANCHEZ,
Plaintiff-Appellant/
Cross-Appellee

S Ct No 123114

vs.

Ct App No 238003

EAGLE ALLOY, INCORPORATED (self-insured) and SECOND INJURY FUND (Dual Employment Provisions),

WCAC No. 00-0248

Defendants-Appellees/
Cross-Appellants.

ALEJANDRO VAZQUEZ,

S Ct No 123115

Plaintiff-Appellant
Cross-Appellee,

vs.

Ct App No 239592

EAGLE ALLOY, INC. (Cambridge Integrated Services Group),

WCAC No. 01-0182

Defendants-Appellees/
Cross-Appellants.

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PLAINTIFFS' BRIEF IN REPLY TO THE *AMICUS CURIAE* BRIEF OF MICHIGAN SELF-INSURERS' ASSOCIATION

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[1] WDCA = Workers Disability Compensation Act, MCL 418.xxx

INTRODUCTION/ COUNTERSTATEMENT OF FACTS

See the Statement of Facts contained in Plaintiffs' original brief.

This brief is authorized by the Court's order of April 7, 2004, which permitted the Michigan Self-Insurers' Association to file a late *amicus curiae* brief, but also permitted Plaintiffs to reply thereto.

COUNTERSTATEMENT OF QUESTIONS PRESENTED

I. DID DEFENDANTS WAIVE THE EARNING CAPACITY/WAGE LOSS ARGUMENTS CURRENTLY RAISED BY AMICUS MSIA?

Plaintiffs say "yes."

The lower tribunals did not address this question.

II. DID PLAINTIFFS' ON-THE-JOB INJURIES CAUSE LOSS OF EARNING CAPACITY?

Plaintiffs say "yes."

The lower tribunals did not address this question, because Defendants did not raise it.

III. DID PLAINTIFFS' ON-THE-JOB INJURIES CAUSE ACTUAL WAGE LOSS?

Plaintiffs say "yes."

The lower tribunals in *Sanchez* said "yes."

The lower tribunals in *Vazquez* did not address this question, because Defendants did not raise it.

COUNTERARGUMENT

I. PLAINTIFFS' ON-THE-JOB INJURIES CAUSED LOSS OF EARNING CAPACITY

A. PLAINTIFFS HAD AN EARNING CAPACITY TO LOSE

STANDARD OF REVIEW: This is a legal question, reviewable de novo. *Beason v Beason,* 435 Mich 791, 804-805 (1990).

1. DEFENDANTS WAIVED THIS ISSUE

At the outset, it should be noted that the "no earning capacity to lose" issue was not raised by Defendants until August 19, 2002, when, in the Court of Appeals, Defendants filed a "Supplemental Authority" citing *Sington v Chrysler Corp,* 467 Mich 144 (2002). Although the Court Rules expressly forbid adding new issues by such a filing,[2] the Court of Appeals permitted same over Plaintiffs' objection.

WDCA 861a(11) prohibits the WCAC from addressing issues not raised by the parties. *Defendants did not argue before the WCAC that Plaintiffs had no earning capacity to lose:*

1. In *Sanchez*, they argued that *wage loss* after August 6, 1999 was not related to the injury. However,

a) since "wage loss" and "lost earning capacity" are two separate things,[3] arguing one

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[2] MCR 7.212(F)(1).

[3] WDCA 301(4) itself recognizes as much: "The establishment of disability [i.e., lost earning capacity] does not create a presumption of wage loss." See also WDCA 301(5)(d)(*iii*): "If

does not preserve the other.

b) Arguing lack of *causation* between injury and wage loss is different than arguing no earning capacity in the first place.

c) If Sanchez had no earning capacity to lose, then logically there could be no finding of disability in the first place. Yet Defendants did not challenge the magistrate's finding that Sanchez was disabled in the first place, instead challenging only the *duration.*[4] By not challenging disability in the first place, Defendants waived any argument that Sanchez had no earning capacity to lose.

2. The waiver is even broader in *Vazquez*, where Defendants did not argue before the WCAC that Vazquez was not disabled, instead unsuccessfully challenging the magistrate's finding that Vazquez's shoulder disability was *caused* by the incident at work.

In short, since Defendants did not raise the "no earning capacity to lose" issue before the WCAC, the WCAC did not, and did not have the authority to, address it.

The fact that the issue was not raised before the WCAC precludes its consideration by the courts. Because the courts' authority over the executive branch is limited to *review* of administrative decisions, and does not extend to deciding administrative questions *in the*

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the employee becomes reemployed and the employee is still disabled..." This recognizes that a worker can be employed (and suffering no wage loss) at the same time that he is disabled (i.e., suffering lost earning capacity).

[4] Defendants argued that disability ended on August 6, 1999, when Sanchez returned to work.

first instance, the courts do not have the authority to decide a question not presented to the WCAC. *Calovecchi v Michigan*, 461 Mich 616, 626 (2000). Unless *Calovecchi* is to be overruled, the Court should not address the "no earning capacity to lose" issue.

2. THE ACT DOES NOT REQUIRE A *DOMESTIC* EARNING CAPACITY

Even if the "no earning capacity to lose" issue were not waived, it is without merit. Defendants and Amicus MSIA cannot point to any portion of the Workers Compensation Act that limits "earning capacity" to Michigan or United States earning capacity, for the simple reason that there is no such language in the Act. Instead, the WDCA requires "a limitation of an employee's wage earning capacity," period.

It is a rule of statutory construction, and of simple grammar, that a word or phrase covers everything within the description of the word or phrase, unless an adjective limits the word or phrase to less than that. *Sington v Chrysler Corp, supra* at 461 Mich 159 ("work" as used in WDCA 301(4) means *all* work, not just some work). Consequently, the phrase "wage earning capacity," without further limitations, means maximum ability to earn wages in *all* work, not just work within Michigan or within the United States. Any other conclusion would amount to rewriting the statute to insert "domestic" or "United States" between "employee's" and "wage earning capacity." Neither the executive nor the judicial branch have the authority to thus amend statutes.

B. THE LOWER TRIBUNALS HAVE DISPOSED OF THE LOST EARNING CAPACITY ISSUES

STANDARD OF REVIEW: In the previous part we saw that Plaintiffs had an earning capacity to lose (or at least that Defendants cannot challenge that finding, having failed to attempt to do so in the WCAC). That leaves the questions of a) whether Plaintiffs' earning capacity was "limited" and b) whether that limitation was causally related to their on-the-job injuries. These are factual question, findings on which must be affirmed if supported by "any" evidence. *Holden v Ford Motor Co*, 439 Mich 257, 263 (1992).

1. THERE WAS RECORD SUPPORT FOR THE FINDINGS THAT ON-THE-JOB INJURIES CAUSED LOST EARNING CAPACITY

In Sanchez's case, it matters not whether he lost his job with Eagle Alloy due to the injury, nor whether he is earning as much at the Finish Corporation job he held at the time of trial. The fact remains that, because of the work-related injury (32b), he is now limited to working 40 hours, versus the 80 hours (for which he earned $750.16 per week; 1a) he was able to work pre-injury. This is "some evidence" supporting the findings below that Sanchez suffered lost earning capacity as a result of his on-the-job injury (52a).[5]

In Vazquez's case, the injury changed him from a worker capable of full-time, regular

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[5] We might add that work-related disability is not even an issue in Sanchez's case before August 6, 1999 (when Sanchez returned to work) since, as the WCAC noted, Defendants did not challenge benefits before that date (27a).

employment to one limited to a succession of temporary jobs, some of which were beyond his capabilities (35b-41b). This is "some" evidence supporting the findings below that, because of Vazquez's on-the-job injury, he remains disabled (i.e., has lost earning capacity) (59a).[6]

2. *SINGTON* IS IRRELEVANT TO THIS ISSUE

MSIA's suggestion that the lower tribunals' findings of continuing disability is erroneous in light of *Sington* is foreclosed by Defendants' failure make any such argument. Their "Supplemental Authority" to the Court of Appeals cited *Sington only* for the proposition that there was no earning capacity to lose. Having chosen to put all their eggs in that basket, Defendants should not be permitted to change ground when that basket is dropped.

Even if the new definition of earning capacity were not waived by Defendants' failure to invoke it, it still would not apply because *Sington is not properly applied retroactively*. Where a change in an established rule or construction would require retrying a substantial number of cases, it will not be applied to already-tried cases unless the precise argument was made in the case.

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[6] These findings explode Amicus MSIA's assertion that Plaintiffs' lost earning capacity/lost wages are due *entirely* to their illegal employment status. On the contrary, any crimes or illegality are at most concurring causes. It is settled that where work injury and noninjury causes combine to produce a disability or wage loss, the case is compensable. See *Ward v Heth Bros,* 212 Mich 180 (1920) and like cases cited *infra.*

Thus, in *Placek v Sterling Heights*, 405 Mich 638 (1979), the Court replaced contributory negligence with comparative negligence. Because contributory negligence is an issue in practically every negligence case, applying comparative negligence retroactively would have required retrying practically every pending negligence case. To avoid that disruptive effect, the court applied the new doctrine only to cases *not yet tried*, and cases where a party had *specifically argued* for abolition of contributory negligence.[7]

Similarly, in *Franges v GMC*, 404 Mich 590, 623 (1979), the court redrew the formula for coordinating workers compensation with tort recoveries. To minimize disruption, the Court applied the new formula to only future cases, and pending cases *where the new formula was advocated.*

Finally, in *Whetro v Awkerman*, 383 Mich 235, 244 (1970), the Court held that a new rule that injuries due to Act of God arise out of the employment applies only to instant and future cases.

Throughout the time the case at bar was pending in the executive branch, *Haske v Transport Leasing*, 455 Mich 628 (1997) was the controlling law on the definition of disability/lost earning capacity. Consequently, both parties, the magistrate, and the WCAC all relied on *Haske* in deciding to proceed and in deciding the case. Moreover,

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[7] Although applying the new rule to *any* pending case is disruptive, the effect is less unfair in a pending case *in which the new rule was advocated,* since the other party, having been warned that the old rule was being challenged, at least had the opportunity to create a record that would satisfy the new rule.

Defendants did not argue for any other definition (much less the definition subsequently adopted in *Sington*), and consequently cannot claim that they are equitably entitled to the benefit of *Sington.* Finally, retroactive application of *Sington* would be highly disruptive, since it would require retrying, not only this case, but every other pending case in which disability is involved.

In short, if *Placek, Franges* and *Whetro* are still good law, *Sington* should not be applied retroactively.[8]

II. PLAINTIFFS' ON-THE-JOB INJURIES CAUSED ACTUAL WAGE LOSS

STANDARD OF REVIEW: This is a legal question, reviewable de novo. *Beason v Beason, supra* at 435 Mich 804-805.

A. WAGES NEED NOT BE LEGAL

While the thrust of Amicus MSIA's argument is that the on-the-job injury must cause loss of a domestic *wage-earning capacity*, MSIA tosses in arguments that the wage loss suffered by Plaintiffs is not compensable because a) they have no *legal wages* to lose and b) the *wage loss* is caused entirely by their illegal status.

Since the first argument was waived by Defendants' failure to argue it at any level in

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[8] Amicus MSIA's reliance on *Sweatt v MDOC*, 468 Mich 172 (2003) is misplaced:

1. The opinion from which the MSIA quotes was signed by three justices of a seven-justice court, and so is no authority.

2. Though mentioned in the opinions, it does not appear that the retroactivity issue was ever briefed nor fairly presented in *Sweatt.*

either case, the Court should therefore not address it.

Even if the argument were not waived, it suffers from the same flaw evident in the MSIA's other argument (and, for that matter, all the arguments made by Defendants): it asks the Court to legislature by rewriting the Act to insert "legal" before "wage" wherever it appears in the Act.

B. WAGE LOSS IS COMPENSABLE EVEN IF CAUSED BY ILLEGALITY

1. DEFENDANTS WAIVED THIS ISSUE

In *Sanchez,*the WCAC agreed with Defendant that there must be a causal relationship between the injury and the wage loss, and remanded to the magistrate on that issue. The magistrate found that there was such a causal relationship, and the WCAC affirmed. Since Defendant *did not challenge that finding on appeal*, the finding that the work injury did cause wage loss is conclusive, rendering moot whether there is any exclusion where wage loss is caused *entirely* by something other than the injury.

In *Vazquez*, Defendant did not even argue that there must be a causal relationship between the injury and wage loss.

In short, because Defendant waived the injury-causing wage loss argument by not appealing it beyond the WCAC *in Sanchez*, and by not raising it at all in *Vazquez*. The Court should therefore not address Amicus MSIA's wage-loss arguments.

2. THE ACT ATTACHES NO CAUSATION REQUIREMENTS TO WAGE LOSS

Apart from waiver, MSIA's argument that Plaintiffs' wage loss was caused entirely by their illegal status lacks merit, since it presumes that the Act attaches a *causal requirement* to wage loss. There is a causal requirement attached to lost *earning capacity*: WDCA 301(4) requires that lost earning capacity "result from" the work-related injury. However, as regards lost *wages*, WDCA 301(5) merely requires that they *exist* (as a prerequisite to recovery of wage-loss benefits), and nowhere says that they are not payable if caused by one thing or not caused by another.[9]

Numerous cases likewise hold[10] that, so long as a worker is disabled (i.e., has lost earning capacity), the case is compensable, regardless of the cause of the unemployment/*wage loss*. *Ward v Heth Bros, supra* (insanity); *LeTourneau v Davidson*, 218 Mich 334 (1922) (age and senility); *Neal v Stuart Foundry*, 250 Mich 46 (1930); *Sims v Brooks, Inc*, 389 Mich 91 (1973) (imprisonment); *Cundiff v Chrysler Corp*, 293 Mich 404,

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[9] The closest the Act comes is WDCA 301(5)(d), which says that if the unemployment/wage loss is caused by *fault*, no wage-loss benefits are available. However, 301(5)(d) applies only where a worker loses his job after 100 or more weeks of post-injury employment.

[10] These are *holdings*, in contrast to *dictum* in *Haske*, where the propriety of an injury-causing-wage-loss requirement was assumed and not challenged. A case is not authority on a point that was conceded or assumed by the parties. *Allen v Duffie*, 43 Mich 1, 11 (1880).

408 (1940) (layoff); *Shaw v GMC*, 320 Mich 338, 344-345 (1948) (layoff); *Sotomayor v Ford Motor Co,* 300 Mich 107 (1942) (leprosy); *Lynch v Briggs Mfg Corp*, 329 Mich 168, 172 (1950) (subsequent non-work-related injury); *Nederhood v Cadillac Malleable Iron Co,* 445 Mich 234, 258 (1994) (heart attack); *Tury v GMC,* 80 Mich App 379, 383 (1978), lv den 402 Mich 908 (1978) (termination); *Powell v Casco Nelmor Corp,* 406 Mich 332, 352 (1979) (cancer); *Lee v Koegel Meats,* 199 Mich App 696, 702 (1993), lv den 447 Mich 1009 (1994) (problem pregnancy).

The foregoing case law is consistent with a plain-language reading of the statute. It is settled that, when construing a statute, it is improper to create or recognize limitations not expressed in the statute. *Russell v Whirlpool Financial Corp*, 461 Mich 579 (2000); *Kreiner v Fischer*, 468 Mich 884 (2003). Since the Workers Compensation Act nowhere says that wage loss is not compensable if caused by one thing or if not caused by another,[11] it would be judicial legislation to create such a causation requirement.

3. ILLEGALITY WAS NOT THE SOLE CAUSE OF WAGE LOSS

Finally, the evidence and findings simply do not support MSIA's contention that the *only* cause of Plaintiffs' wage loss was their illegal status. On the contrary, reasons unrelated to Plaintiffs' undocumented status contributed to their lost wages, such as on-the-job injuries interfering with their ability to perform certain jobs (and jobs ending or

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[11] Except, as noted, where the wage loss/ loss of work is caused by "fault" in the 100 week-plus situation. WDCA 301(5)(d).

being terminated for attendance in Vazquez's case). In short, Plaintiffs' wage loss was caused by a combination of factors, including their work-related injuries. Since concurrent causation is enough in workers compensation cases, the fact that the work-related injuries were *one* cause of Plaintiffs' lost wages is enough, even if we were to manufacture a requirement that the work injury cause the wage loss.

RELIEF REQUESTED

Having been waived by Defendants, the earning capacity/wage loss arguments raised by Amicus MSIA should not be addressed by the Court. If they are addressed, they should be rejected as contradicting the case law and the plain language of the statute.

Respectfully submitted,

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